No. 80-1031

# In the Supreme Court of the United States

OCTOBER TERM, 1980

ARTHUR WAYNE BALDWIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION


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### QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were violated by the plain view taking of samples of cocaine from his bedroom and automobile by a police undercover agent whom petitioner had hired as a chauffeur and taken into his home.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20a-28a) is reported at 621 F. 2d 251. The order of the court of appeals denying the petition for rehearing (Pet. App. 1a-19a) is reported at 632 F. 2d 1.

## JURISDICTION

The judgment of the court of appeals was entered on May 21, 1980. A petition for rehearing was denied, with two judges dissenting on the merits, on September 30, 1980. On November 29, 1980, Justice Stewart extended the time for filing a petition for a writ of certiorari to December 28, 1980. The petition for a writ of certiorari was filed on December 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on one count of possession of cocaine with intent to distribute it (21 U.S.C. 841(a)(1)) and on three counts of possession of cocaine (21 U.S.C. 844(a)). He was sentenced to two years' probation. The court of appeals affirmed (Pet. App. 20a-28a).

Joe Hoing, an undercover Memphis police officer, was assigned to frequent nightclubs, including the topless Playgirl Clubs owned by petitioner, as an apparent customer, so that he could "see what was going on there and look for violations" (A. 186-187).[1] Specifically, Hoing was to observe the activities of police officers who frequented the clubs (A. 191). During the year that followed, Hoing spent an increasing amount of time at petitioner's clubs (A. 190). When Hoing learned from a club manager that petitioner was looking for a new chauffeur, Hoing applied for the job and was hired after a personal interview (A. 81). Hoing

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[1] "A." refers to the appendix filed in the court of appeals.

thereafter resided with petitioner at his apartment, together with petitioner's girlfriend and 14-year old son (A. 83-84). When petitioner purchased a larger house, Hoing also resided there (A. 96). Hoing had free and unrestricted access to all parts of both residences (Pet. App. 22a). Thus, as petitioner testified, he trusted Hoing and did not hide anything from him (A. 891).[2]

During the course of his employment, Hoing observed petitioner using cocaine on a number of occasions (A. 96, 353, 357). He was also present in petitioner's hotel room when petitioner discussed with another individual the purchase of 21 packages of cocaine (A. 356-357). On one occasion, during a party at a nightclub, petitioner sent Hoing to their apartment to pick up cocaine, telling Hoing where in the apartment the substance was located (A. 99-100, 326-327).

While living at petitioner's residences, Hoing took three different samples of cocaine, which he observed there in plain view; these samples were subsequently admitted as evidence against petitioner (Pet. App. 22a-23a). On the first occasion, the cocaine was on the top of a dresser in petitioner's apartment bedroom. Petitioner was in the bathroom adjoining the bedroom preparing to leave on a trip, and Hoing had entered the bedroom to talk to petitioner. While Hoing was there, he noticed the cocaine and took a sample (A. 87-88). On the second occasion, Hoing found the cocaine in a baggie on the floorboard of petitioner's automobile. Petitioner had thrown onto the floorboard a number of items, including the baggie, and he had

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[2]For instance, when petitioner made an out-of-state trip, he left his son in Hoing's custody (A. 95). Similarly, when petitioner was serving a sentence for income tax evasion, he first made Hoing the manager of a Playgirl Club and later promoted him to president of the entire Playgirl organization (A. 101, 890).

instructed Hoing to clean out the floorboard as part of his job (A. 93-94). On the third occasion, Hoing noticed a baggie of cocaine on the dresser in petitioner's bedroom in the house. He took a sample from the baggie (A. 97).

The district court found that Hoing was lawfully in a position to observe the cocaine which he took from the two bedrooms, since the nature of his employment gave him the run of both the apartment and the house with petitioner's permission (Pet. App. 34a-35a, 39a). The court further found that Hoing was not conducting a search or "ransacking for evidence" when he came across the cocaine, and the samples that he took thus came within the "plain view" exception (*id.* at 39a-40a). As to the cocaine obtained while cleaning out petitioner's automobile, the court found that "it was Hoing's specific job to do this kind of work" (*id.* at 35a).

The court of appeals affirmed (Pet. App. 20a-28a), holding that "Hoing's presence in the Baldwin household was legal, as was his gathering of evidence which was in plain view" (*id.* at 28a). The petition for rehearing en banc was denied (*id.* at 1a-2a), with two judges dissenting on the merits (*id.* at 3a-19a). The dissenters would have held that a warrant was required for the police to place Hoing as an employee in the Baldwin household (*id.* at 18a).

## ARGUMENT

Contrary to petitioner's assertion (Pet. 13), the three cocaine samples were not acquired by the government as the result of any search. Rather, as the district court properly found, two of the samples were left by petitioner in plain view in places that Hoing normally visited in the course of his daily routine, and the third specimen was found while Hoing was performing his employment duties at petitioner's specific direction. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of

Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Accordingly, there was no violation of the Fourth Amendment here.

Petitioner nonetheless contends that Hoing's activities violated the Fourth Amendment because he obtained his employment, and hence also the entry into petitioner's home that enabled him to observe and take the cocaine samples, through pretext. Based on this premise, petitioner contends (Pet. 9) that a search warrant is constitutionally required before an undercover agent may pretextually enter a private home for the purpose of obtaining evidence. In closely analogous situations, however, this Court has recognized that the Fourth Amendment is not violated when law enforcement officers fail to disclose or misrepresent their status or motive in order to obtain consent to enter an otherwise constitutionally protected area. See *Lewis* v. *United States*, 385 U.S. 206 (1966); *Hoffa* v. *United States*, 385 U.S. 293 (1966).

In *Hoffa*, an informant who was an acquaintance of the defendant gave incriminating testimony based on information gained during his frequent visits to the defendant's hotel suite. Rejecting a claim that the defendant's consent was vitiated because the informant had not disclosed his actual role and purpose in making his visits, the Court stated (385 U.S. at 302; footnote omitted):

> [I]t is evident that no interest legitimately protected by the Fourth Amendment is involved. * * * [The informant] was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that [the informant] would not reveal his wrongdoing.

Similarly, in *Lewis*, a narcotics agent was invited into the defendant's residence after misrepresenting his identity and expressing a willingness to purchase drugs. Noting that at no time "did the agent see, hear, or take anything that was not contemplated * * * by petitioner," the Court held that it was not constitutionally impermissible for a government agent to use deceptive tactics to gain admission to a suspect's home because "[a] government agent, in the same manner as a private person, may accept an invitation to * * * enter upon the premises for the very purposes contemplated by the occupant" (385 U.S. at 210-211). See also *United States* v. *Ressler*, 536 F. 2d 208, 211 (7th Cir. 1976); *United States* v. *Guidry*, 534 F. 2d 1220, 1221-1222 (6th Cir. 1976); *United States* v. *Glassel*, 488 F. 2d 143, 145 (9th Cir. 1973), cert. denied, 416 U.S. 941 (1974); *State* v. *Anglada*, 144 N.J. Super. 358, 365 A.2d 720 (1976).[3]

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[3]Petitioner's effort to distinguish *Hoffa* and *Lewis* is unpersuasive. Petitioner attempts (Pet. 18) to distinguish *Hoffa*, for instance, by suggesting that that case involved only the reporting of conversations in which the informant was a participant, as opposed to the taking of physical evidence. That distinction is insubstantial. First, the *Hoffa* informant reported not only those conversations in which he was a participant, but also those that he simply overheard. See 385 U.S. at 302. Under the Court's holding in *Hoffa*, Hoing was certainly free to testify as to his observations of petitioner's cocaine use, his overhearing of the conversation in which petitioner discussed the purchase of cocaine, and the instance in which petitioner sent him to get his cocaine. Petitioner has no greater expectation of privacy as to the maintenance of cocaine in his home or automobile. More importantly, however, Hoing was able to see and take specimens of petitioner's cocaine for the same reason that the *Hoffa* informant was able to testify as to the defendant's conversations: petitioner mistakenly reposed his trust in Hoing and gave him free run of the premises. As the Court's decision in *Hoffa* makes clear, the Fourth Amendment affords no protection to one who assumes the risk of taking an informant into his confidence with respect to criminal activities. See also *United States* v. *Henry*, No. 79-121 (June 16, 1980), slip op. 8.

Likewise, petitioner seeks (Pet. 20-22) to distinguish *Lewis* on the ground that the undercover agent there was invited into the defendant's home for the purpose of illegal activity, and that he acquired the

Petitioner's reliance (Pet. 10-23) on *Gouled* v. *United States*, 255 U.S. 298 (1921), is likewise misplaced. *Gouled* simply prohibits an undercover agent who has obtained entry by guile from conducting a general search or ransacking for evidence. See *Lewis* v. *United States, supra*, 385 U.S. at 210-211; *United States* v. *Raines*, 536 F. 2d 796, 800 n.5 (8th Cir.), cert. denied, 429 U.S. 925 (1976); *United States* v. *Ressler, supra*, 536 F. 2d at 211; see also *Hoffa* v. *United States, supra*, 385 U.S. at 301. Here, as we have shown, Hoing neither ransacked nor even searched for evidence, but merely took items that were in plain view. Moreover, even if the facts of *Gouled* did not support the conclusion that the Court was there concerned only with ransacking or general searches,[4] the case would still be inapplicable to the facts presented here. First, what was taken in *Gouled* were private papers (see *Hoffa* v. *United States, supra*, 385 U.S. at 301), not contraband narcotics. At the time *Gouled* was decided, seizures of "mere evidence" were prohibited. More importantly, the defendant in *Gouled* had no expectation that, by accepting a purportedly friendly call from an

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physical evidence not through a search, but by being given it by the defendant. Petitioner's distinction is unpersuasive. Here, as in *Lewis*, there was no search. Hoing acquired one cocaine specimen by following petitioner's direction to clean out his automobile; Hoing found the other two specimens in plain view in a place that he routinely visited with petitioner's permission. For Fourth Amendment purposes, there is no distinction to be drawn between finding something in plain view and being given it. It is the search, not the actual seizure of evidence, that may violate some legitimate right of privacy. We suggest that the purpose of an invitation is likewise without significance for Fourth Amendment purposes. See *United States* v. *Oakes*, 564 F. 2d 384, 386 (10th Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States* v. *Raines*, 536 F. 2d 796, 799-800 (8th Cir.), cert. denied, 429 U.S. 925 (1976); *United States* v. *Ressler, supra*, 536 F. 2d at 211.

[4]The record in *Gouled* shows only that the undercover agent visited the defendant in his office and took papers from the top of the defendant's desk when the latter stepped out for a moment. See Appendix to Brief for the United States, No. 250, O.T. 1920, at 58-59.

acquaintance (see 255 U.S. at 304), he was surrendering his right of privacy in the papers on his desk.[5] In contrast, Hoing was no mere acquaintance making a single call. He was a trusted associate who both had the run of petitioner's residences and was well acquainted with petitioner's use of cocaine. In these circumstances, petitioner simply could not have had any expectation of keeping his packets of cocaine private from Hoing. Indeed, he did not have such an expectation, as was demonstrated by his request that Hoing go to his home and bring back some cocaine. See A. 99-100, 326-327.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Even if the undercover agent in *Gouled* did not conduct a general search, he nonetheless had to scrutinize the documents on the desk to determine which he should take. The cocaine in this case, on the other hand, was immediately recognizable and in plain view.